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Nos. 85-1239, 85-1406

In The
Supreme Court of the United States
October Term, 1985

ARCO ALASKA, INC.;
AMOCO PRODUCTION COMPANY, et al.,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,
Respondents.

DONALD P. HODEL, Secretary of the Interior;
and UNITED STATES DEPARTMENT
OF THE INTERIOR,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI

Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance (ASIA) are organizations which represent a broad spectrum of the public vitally interested in the fair and accurate interpretation of the environmental and conservation statutes that guide

the exploration for and development of Alaska's vast offshore petroleum energy resources. RDC and ASIA represent individuals and organizations, both private and governmental, whose economic survival will be, and is now being, severely and negatively impacted by erroneous legal rules and statutory constructions emanating from the United States Court of Appeals for the Ninth Circuit's decision in this case.

The Ninth Circuit's announced rule of a per se requirement of injunctive relief upon a prima facie showing of violation of an environmental or conservation statute has operated to unreasonably restrict the opportunities of RDC and ASIA's members to pursue their livelihoods and count upon stable sources of income. The Ninth Circuit's construction of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, has the capacity for producing negative effects on the Alaska and national economies by requiring the Secretary of the Interior to attempt to evaluate effects of outer continental shelf (OCS) exploration and development or production at a time in the leasing process when such effects are uncertain and speculative at best. Finally, the Ninth Circuit's decision in this case has ignored legislative history and thereby subverted congressional intent regarding expeditious OCS inventorying and development. The Ninth Circuit has attempted to redefine the public and national interest in a manner unintended by Congress and clearly harmful to amici's interest in their members' ability to pursue their livelihood. Consent for the filing of this brief has been obtained from the parties and previously lodged with the Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 774 F.2d 1414 (9th Cir. 1985).

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in petitioners' opening brief.

SUMMARY OF ARGUMENT

1. The Ninth Circuit has used the case under review as a vehicle for announcing a per se rule of automatic injunctive relief upon a prima facie showing of violation of an environmental or conservation statute. This local rule is in direct conflict with the guidance furnished by this Court in *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), for determining the appropriate conditions for limiting the equitable discretion of federal courts.

2. In its decision in *Secretary of the Interior v. California,* 464 U.S. 312 (1984), this Court recognized that the phased or tiered structure of federal decision making under the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.,* reflects a conscious choice by Congress to key environmental review of OCS development activities to those tiered stages of decision making. The decision by the Ninth Circuit in the case under review creates a single anomalous exception to this carefully crafted structure of federal review for the evaluation of subsistence use impacts mandated by Section 810(a) of the

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a). The Ninth Circuit's justifications for this exception are unavailing and, in fact, result in rendering portions of ANILCA superfluous.[1]

3. The Ninth Circuit announced in the case under review that Congress in enacting Section 810(a) of ANILCA intended to create a substantive preference for the preservation of subsistence uses over the meeting of national OCS inventorying and development requirements. This assertion is unsupported by the legislative history of the Act and constitutes a clear usurpation of Congress' unique role as the setter of national policy.

ARGUMENT

I

THE NINTH CIRCUIT'S PER SE RULE FOR THE GRANTING OF INJUNCTIVE RELIEF DIRECTLY CONTRADICTS THIS COURT'S RULING IN WEINBERGER v. ROMERO-BARCELO

A. The Ninth Circuit Has Established a Per Se Rule for Granting Injunctive Relief When an Environmental or Conservation Statute Appears to Have Been Violated

Despite respondent People of the Village of Gambell's protestations to the contrary,[2] it is clear beyond a doubt

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[1] Amici are in full agreement with petitioners that the Ninth Circuit erred in ruling that ANILCA applies to the OCS, and adopt petitioners' statement of this issue and their arguments addressed to it. Amici only argue in the alternative that if this Court should accept the Ninth Circuit's position in applying ANILCA to the OCS, that court's application is contrary to the requirements of *Secretary of the Interior v. California*.

[2] *See, e.g.*, respondent's Brief in Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 28.

from the language employed by the Ninth Circuit in *People of the Village of Gambell v. Hodel* (*Gambell II*), 774 F.2d 1414 (9th Cir. 1985), as well as from other recent cases in the Ninth Circuit involving the granting of injunctive relief,[3] that the Ninth Circuit has fashioned a per se rule requiring the granting of an injunction when the moving party succeeds in making a nonfrivolous showing of the violation of an environmental or conservation statute.

In *Gambell II* the Ninth Circuit reviewed the District Court's discretionary refusal to enjoin exploratory drilling under Lease Sale 57 in Norton Sound and Lease Sale 83 in the Navarin Basin, both off the coast of Alaska. *Gambell II*, 774 F.2d at 1417-18. The District Court's action was based on its specific findings:

> "(1) Movants have established a strong likelihood of success on the merits.
>
> "(2) The balance of irreparable harm does *not* favor the movants.
>
> "(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent." *Id.* at 1418 (emphasis in original).

Thus, the District Court engaged in just that process intended to "'balance the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction' "

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[3] *See, e.g., Steamboaters v. Federal Energy Regulatory Commission*, 777 F.2d 1384 (9th Cir. 1985); *Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *Tribal Village of Akutan v. Hodel*, No. 86-3512 (9th Cir. 1986) (order sustaining preliminary injunction).

which this Court has consistently required. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982), *citing Yakus v. United States,* 321 U.S. 414, 440 (1944). This process proved unacceptable to the Ninth Circuit.

The Ninth Circuit found the District Court's refusal of injunctive relief "not consistent with the law of this circuit," *Gambell II,* 774 F.2d at 1422, because the District Court had denied the requested injunction "[n]otwithstanding its [*i.e.,* the District Court's] determination that the Secretary violated the procedural requirements of section 810(a) of the Conservation Act." *Id.* The District Court's "inconsistent" exercise of the usual equitable discretion was improper because the law of the Ninth Circuit is that "[a]n injunction is the *appropriate remedy* for a substantive procedural violation of an environmental statute." *Id., citing Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985) (emphasis added). Once a prima facie violation is made out, a District Court in the Ninth Circuit commits legal error in not awarding injunctive relief.

Furthermore, the dimensions of any remaining "discretion" in the District Court under the Ninth Circuit's "appropriate" standard shrink to practical nonexistence; it is clear from *Gambell II* that "appropriate" actually means "required." Thus, in concluding that the District Court's justifications for denying the requested injunction were "inappropriate," 774 F.2d at 1423, the Ninth Circuit decided that none of the proffered justifications

> "excuse its *duty to issue an injunction* in light of its determination that there was a strong likelihood that the Villages would prevail in their contention that section 810(a) of the Conservation Act had been violated." *Id.* (emphasis added).

Once the appropriate showing of violation is made, the duty to enjoin matures simultaneously.

Moreover, even were this Court inclined to overlook language that speaks of equitable remedies in terms of an absolute, nondiscretionary "duty," the Ninth Circuit's overall approach completely inverts the scheme of equitable relief that this Court has painstakingly created through the years. In *Weinberger v. Romero-Barcelo, supra,* the Court noted that "[i]t goes without saying" that equitable remedies do not issue " 'as of course.' " *Id.* at 311, *citing Harrisonville v. W. S. Dickey Clay Manufacturing Co.,* 289 U.S. 334, 337-38 (1933). " 'Flexibility rather than rigidity has distinguished it [equitable relief].' " *Weinberger,* 456 U.S. at 312, *citing Hecht Company v. Bowles,* 321 U.S. 321, 329 (1944). This must be so because "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger,* 456 U.S. at 313, *citing Tennessee Valley Authority v. Hill, (TVA),* 437 U.S. 153, 193 (1978), *Hecht v. Bowles,* 321 U.S. at 329.

But just this proscribed sort of mechanical regimentation is forced upon district courts in the Ninth Circuit when the apparent violation of an environmental or conservation statute is at issue. Rather than affording the District Court sitting in equity that " 'full opportunity . . . to treat enforcement proceedings . . . in accordance with their traditional practices as conditioned by the necessities of the public interest,' " *Weinberger,* 456 U.S. at 320, *citing Hecht,* 321 U.S. at 330, as this Court has required, the practice of the Ninth Circuit actually requires the District Court to attempt, however futilely, to "*justif*[*y*] *the denial* of a preliminary injunction," *Gambell II,* 774 F.2d

at 1425 (emphasis added), when a showing of probable success on the merits has been made.[4] Clearly, the Ninth Circuit's unique rule constitutes a per se requirement of injunctive relief.

B. The Ninth Circuit's Per Se Rule Subverts the Statutory Analysis Required By This Court in Weinberger v. Romero-Barcelo

In *Weinberger v. Romero-Barcelo, supra,* this Court overturned a decision of the First Circuit requiring the District Court for the District of Puerto Rico to issue an injunction for a violation of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251, *et seq.* In reaching its decision overruling the First Circuit, the Court considered and rejected arguments that the decision then *sub judice* was controlled by the Court's prior decision in *TVA v. Hill, supra. See Weinberger,* 456 U.S. at 310, 314-18.

Rather than blindly relying on the result in *TVA v. Hill,* the Court began its analysis with an examination of traditional equitable principles, *see Weinberger,* 456 U.S. at 311-13, noting that the traditional discretion of federal equity courts was subject to modification by Congress: "Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *Id.* at 313, *citing Hecht,* 321 U.S. at 329.

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[4] The futility derives from the extreme unlikelihood that a District Court will be able to bring any particular set of factual circumstances within the only two grounds for denial, viz., that an injunction will actually harm the environment or interrupt the performance of long-term contracts. *See Gambell II,* 774 F.2d at 1424-25.

The modification power reposed in Congress necessitates a scrutiny of the statutory scheme (for which enforcement is being sought) for guidance on the dimensions of equitable discretion under the statute: " 'Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a *clear and valid legislative command.*' " *Weinberger,* 456 U.S. at 313, *citing Porter v. Warner Holding Co.,* 328 U.S. 395 (1946) (emphasis added). The Court's analytical framework was set by the conclusion that the statutory scheme must be explicit in its intent to limit equitable discretion: " '*Unless a statute in so many words, or by a necessary and inescapable inference,* restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.' " *Id.* (emphasis added).

The Ninth Circuit in *Gambell II* made no use whatsoever of this method. Rather, the principle from which ANILCA's requirements were viewed was that "a preliminary injunction should issue where a federal agency has violated the procedural requirements of an environmental protection or conservation statute," *Gambell,* 774 F.2d at 1428, *i.e.,* without the *Weinberger* scrutiny of the specific equitable orientation of the statute at issue. That this is the case in the Ninth Circuit is well illustrated by the contradictory position reached by the court concerning the unsuitability of the Secretary's National Environmental Policy Act (NEPA) subsistence use impact study to fulfill the subsistence use evaluation required by ANILCA. *See Gambell II,* 774 F.2d at 1420-22.

While denying the Secretary the opportunity to utilize the subsistence use impacts study performed for NEPA

compliance to satisfy the subsistence use evaluation required by ANILCA, the court noted that

> "[w]e previously have held that 'compliance with one environmental statute does not assure compliance with another.' Where each statute mandates separate and distinct procedures, compliance with the requirements of one does not compel the conclusion that the provisions of the other statute were considered. Neither the Environmental Act [NEPA] nor the Lands Act [Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA)] sets forth procedures to ensure the protection of subsistence needs and uses. In contrast, the Conservation Act [ANILCA] was created 'to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.'
>
> "As we noted in *Gambell I* [*People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984)], 'Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife "is essential to [their] existence".' *The separate and distinct procedures* set forth in section 810(a) of the Conservation Act were enacted to fulfill that purpose. *The Environmental Act and the Lands Act do not, by their terms, seek to advance the same Congressional goals.*" *Gambell II*, 774 F.2d at 1421 (emphasis added; citations omitted).

Yet these widely differing statutes receive the same treatment without *Weinberger* scrutiny on the question of the propriety of preliminary injunctive relief. The court recognizes that the congressional goals to be achieved and the procedures required to meet those goals were "separate and distinct," but in furtherance of its per se rule ignores these differences when the issue is the equitable discretion of a reviewing court. This method does not so much violate *Weinberger* as loftily ignore it.

The clear teaching of *Weinberger* is that such an *a priori* rule limiting equitable remedies under a statutory scheme is immediately suspect. The scheme itself must first be examined for indications of congressional intent regarding the extent of permissible equitable relief. The Ninth Circuit's per se rule renders this required statutory scrutiny impossible of accomplishment. In its disregard of congressional intent and complete indifference to the careful weighing of inferences flowing from a statute's internal structure that the Court relied on in *Weinberger*, the Ninth Circuit's insensitive proactive approach is completely alien to this Court's express requirements.

II

THE DECISION OF THE NINTH CIRCUIT REQUIRING THE FULL PROCEDURAL APPARATUS OF ANILCA § 810(a)(1)-(3) AT THE LEASE SALE STAGE OF OCS DEVELOPMENT FOR SUBSISTENCE USE IMPACTS THAT MAY OCCUR ONLY AT SUBSEQUENT STAGES OF EXPLORATION AND PRODUCTION/DEVELOPMENT IS CONTRARY TO THIS COURT'S RULING IN SECRETARY OF THE INTERIOR v. CALIFORNIA

A. The Secretary's Subsistence Use Evaluation Meets This Court's Requirements for Tiered Environmental Review of OCS Activities

In *Secretary of the Interior v. California*, 464 U.S. 312 (1984), this Court reviewed the requirements of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, *et seq.*, in the context of OCS development activities. In order to resolve the issues then before it, the Court found it appropriate to examine the structure and policy of OCSLAA, 43 U.S.C. § 1331, *et seq.*, "for a clarification

of the differences between a lease sale and the approval of a plan for 'exploration,' 'development,' or 'production.'" *Secretary of the Interior v. California*, 464 U.S. at 336. The Court found that in recognizing the above differences "Congress had thus taken pains to separate the various federal decisions involved in formulating a leasing program," *id.* at 340, and the separate federal decisions represented "distinction[s] that Congress has codified *with great care.*" *Id.* at 336 (emphasis added). The decision of the Ninth Circuit in *Gambell II* completely obliterates these carefully crafted congressional distinctions.

The Supreme Court identified the effect and purpose of the tiered structure of OCS activities under OCSLAA as follows:

> "Each stage involves *separate regulatory review* that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. *And each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States.*
>
> . . . .
>
> ". . . [T]he purchase of an OCS lease, standing alone, entails *no right to explore for, develop, or produce oil and gas resources on the OCS.* . . . The stated reason for this four-part division was *to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.*" *Secretary of the Interior v. California*, 464 U.S. at 337, 340-41 (emphasis added).

The Court could not have said more plainly that regulatory review, including environmental review of OCS activities, was to proceed at the pace of the activities themselves as

permitted under OCSLAA. Environmental review conducted in this manner would minimize threats of unripe litigation. The Ninth Circuit in *Gambell II* has consciously ignored the teaching of *Secretary of the Interior v. California* with precisely those undesirable results the Court foresaw.

The Secretary's Section 810(a) evaluation for Lease Sale 57 specifically found that it "has not and will not significantly restrict subsistence uses." *See* Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (filed by petitioner Secretary of the Interior in this matter), Appendix J at 85a. Relying on *Secretary of the Interior v. California,* the evaluation indicated that the extent of its required Section 810(a) inquiry was limited to considering the effects of the lease sale stage of OCS development,[5] but went on to include a hypothetical assessment of subsistence use restrictions at the subsequent stages of exploration and development/production as well. Appendix J at 84a. The evaluation justified this treatment by noting:

> "Since each of these stages has a different probability of occurring as well as a different potential for affecting the environment, this division will also better identify the possible restrictions of each stage on subsistence uses. Future stages are evaluated to the extent possible at this time. *We emphasize that, at present, no development and production plans have been proposed.* For this reason, the discussion of

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[5] "Recent case law distinguishes the lease sale from other stages of OCS development, i.e., exploration, development and production. Thus, we are required to consider at this stage only the effects of the lease sale, and not the effects of exploration or development and production." Appendix J at 84a.

the development & production stage is based on the hypothetical scenarios and oil-spill-risk-analysis included in the 87 FEIS (USDOI MMS 1982).

> "To repeat, however, we are not required to consider anything other than the lease sale (and associated preliminary activities) at this stage. *Therefore, the discussion of subsequent stages (exploration, development & production) should not be viewed as the final 810 evaluation for those stages, and should not be regarded as a statement of events which will actually occur.*" *Id.* at 84a-85a (emphasis added).

Thus, the Secretary's methodology in evaluating possible subsistence use restrictions as a result of OCS activities tracked precisely with this Court's assessment of congressional intentions under OCSLAA.

B. The Ninth Circuit's Failure to Follow Secretary of the Interior v. California Is Unjustifiable

But the Ninth Circuit was not persuaded. Noting that the Secretary's necessarily hypothetical evaluation of *future* subsistence use restrictions at the *development/production stage* had identified possible significant restrictions, the court required the full panoply of Section 810(a)(1)-(3) procedures to be undertaken at the *lease sale stage:*

> "We made it clear in *Kunaknana* [*v. Clark,* 742 F.2d 1142 (9th Cir. 1984)] that under the express language of section 810(a)(3), the Secretary was required to comply with the notice and hearing requirements of the statute to determine *inter alia* whether ' " such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands." ' 742 F. 2d at 1150-51 (*quoting* section 810(a)(3))." *Gambell II,* 774 F.2d at 1422.

The court identified two reasons for not following the tiered analysis mandated by this Court in *Secretary of the Interior v. California, supra:* the inapplicability of the analysis found in *Secretary of the Interior;* and the control, by way of exception, of the "specific" requirements of ANILCA over the "general" requirements of OCSLAA. *Gambell II,* 774 F.2d at 1422. These asserted justifications for not conforming to this Court's requirements are erroneous for the following reasons.

1. The Tiered Decision Making Structure of OCSLAA Controls ANILCA Procedures Exactly As It Controls Endangered Species Act and National Environmental Policy Act Procedures

There is no basis for the position that the Court's analysis of congressional purpose underlying the four-part division of development activities on the OCS is limited to the interactions of OCS activities with the single statutory scheme of the CZMA. The fact that the Court in *Secretary of the Interior v. California* did not have before it the requirements of Section 810(a) of ANILCA is immaterial; the Court was announcing the effects of the 1978 amendments to the Outer Continental Shelf Lands Act as much as it was specifying the reach of the CZMA. The attempt to limit the applicability of *Secretary of the Interior* to CZMA-related procedures is arbitrary, superficial, and clearly erroneous.

Moreover, less than 18 months prior to its decision in *Gambell II* the Ninth Circuit had expressed precisely the opposite opinion in a case entirely missing from the *Gambell II* analysis. In *Village of False Pass v. Clark,* 733 F.2d 605 (9th Cir. 1984), the court established the

methodology for applying the procedural requirements of the Endangered Species Act (ESA) and NEPA to OCS activities. In that case the Ninth Circuit had no problem finding that ESA and NEPA procedures were governed by OCSLAA in the manner prescribed by this Court in *Secretary of the Interior v. California:*

> "The Supreme Court recently explained the basic structure of OCSLA in *Secretary of the Interior v. California,* — U.S. —, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984). . . . Although the present case applied OCSLA in a different factual situation, *there is no doubt that we are bound by the Court's analysis of OCSLA." Village of False Pass,* 738 F.2d at 608 (emphasis added).
>
> "Thus, it is clear that OCSLA prescribes three distinct stages for offshore oil and gas activities: leasing, exploration, and development and production. . . . *Our analysis of this case, therefore, requires us to take into consideration the three separate stage approach of OCSLA." Id.* at 609 (emphasis added).

The absence of any reference to this language from *Village of False Pass* in *Gambell II* therefore is the more puzzling. The *Gambell II* court may be understood as either reversing *Village of False Pass sub silentio* or limiting it to the specific statutes at issue in that case. Either interpretation is forbidden by the plain import of this Court's decision in *Secretary of the Interior v. California.*

2. The Appeal to Statutory Construction Aids Is Flawed

The principles of statutory construction advanced by the court are inapplicable. In refusing to order compliance with the procedural requirements of Section

810(a)(1)-(3) of ANILCA within the tiered decision-making structure of OCSLAA, the Ninth Circuit found ANILCA to be excepted from the entire OCSLAA process:

> "In the Conservation Act [*i.e.*, ANILCA], however, Congress has expressly provided for a *specific and detailed procedure* to be followed in evaluating the impact on subsistence use of the lease of public land for exploratory activities. . . . 'It is a basic rule of statutory construction that a specific statute controls over a general statute.' . . .
>
> ". . . [T]he specific procedural requirements of section 810(a)(1)-(3)—which are triggered by the threat of a significant restriction of subsistence use—were intended by Congress to serve as *an exception to the general provisions of the Lands Act* [*i.e.*, OCSLAA]." *Gambell II*, 774 F.2d at 1422 (emphasis added; citations omitted).

Aside from the complete incompatibility of this rationale with the *Village of False Pass* decision finding two other equally specific and detailed environmental enactments, ESA and NEPA, to be within the OCSLAA procedural ambit, the stated principle of statutory construction is inapplicable to the interrelationships between ANILCA and OCSLAA.

First, the statement of the rule of specific enactments controlling general ones as formulated above is seriously incomplete. As the Ninth Circuit itself has previously recognized, a specific statute controls a general one only to the extent of irreconcilable conflict: "[P]rinciples of construction requiring the more recent and specific statute to prevail over the earlier and more general only apply when *there is an irreconcilable conflict* between statutes." *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 490 n.8 (9th Cir. 1984), *citing Watt v. Alaska*, 451 U.S. 259, 266 (1981). The court made absolutely no effort to demonstrate any such

irreconcilable conflict between ANILCA's Section 810(a) requirements and the tiered decision-making structure of OCSLAA.[6] Thus, the invocation of the aid to construction is not ripe.

Second, the invocation of the preference for later "specific" enactments over earlier more "general" ones amounts to the assertion of an implied repeal *pro tanto* of the allegedly conflicting portions of the earlier OCSLAA. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (statutes in irreconcilable conflict justify implied repeal). Such implied repeals are disfavored. *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 868 (1983). Rather, the reviewing court has a duty to harmonize the apparently conflicting statutes, and to give effect to each where possible to do so. *Watt v. Alaska, supra; accord Get Oil Out! Inc. v. Exxon Corporation*, 586 F.2d 726 (9th Cir. 1978): "It is our obligation to so construe federal statutes *so that they are consistent with each other*, as by this means *congressional intent can be given its fullest expression.*" *Id.* at 729. The Ninth Circuit has made no effort to harmonize ANILCA and OCSLAA and give effect to both, although its own precedent requires it to do so. Under these conditions of complete failure either to demonstrate irreconcilable conflict between ANILCA's Section 810(a)(1)-(3) procedures and OCSLAA's tiered decision-making structure, or to attempt to harmonize the above provisions of the acts, the Ninth

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[6] Indeed in *Village of False Pass*, the Ninth Circuit found OCSLAA and other detailed environmental schemes to be not merely *not irreconcilable*, but rather, to be positively "complementary." *See id.* at 609, 612.

Circuit's assertion of ANILCA's exception from the structure of OCSLAA is erroneous.

C. Failure to Follow Secretary of the Interior v. California Results in Waste and Redundancy of Environmental Review

Finally, it should be noted that the Ninth Circuit's refusal to be bound by this Court's decision in *Secretary of the Interior v. California* in the context of ANILCA's Section 810(a) requirements has the further unfortunate result of rendering superfluous a specific subsequent portion of ANILCA. Section 810(b) of the Act provides:

> "If the Secretary is required to prepare an environmental impact statement pursuant to section 4332(2)(C) of Title 42, he shall provide the notice and hearing and include the findings required by subsection (a) of this section *as part of such environmental impact statement.*" *Id.* (emphasis added).

It is well established that NEPA applies at all the discrete stages of the tiered OCSLAA process. *Village of False Pass, supra.* As noted so many times above, staged application of regulatory review is implicit in the carefully crafted nature of OCS development decision making. However, a requirement that the Secretary conduct the full panoply of Section 810(a)(1)-(3) procedures at the lease sale stage would render the subsequent evaluations at the exploration and development/production stages redundant or superfluous. The command of Section 810(b) that makes perfect sense when review is performed as necessary and appropriate is rendered useless and nugatory by the Ninth Circuit's construction. A statutory interpretation that results in surplusage or absurdity is to be avoided. *Bell v. New Jersey,* 461 U.S. 773 (1983); *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982).

III

BY ASSERTING THAT UNDER THE PROVISIONS OF ANILCA CONGRESS HAS DECIDED TO FAVOR NATIVE ALASKANS' SUBSISTENCE NEEDS AND CULTURE OVER NATIONAL ENERGY NEEDS, THE NINTH CIRCUIT HAS USURPED THE FUNCTION OF POLICY FORMULATION THAT BELONGS SOLELY TO CONGRESS

As shown above in Section I.B., the Ninth Circuit in *Gambell II* refused to perform the scrutiny of statutory structure and purpose this Court required in *Weinberger v. Romero-Barcelo* for determining the extent of equitable discretion in statutory enforcement. Nevertheless, the court did engage in statutory analysis of a sort for the purpose of justifying the per se rule governing environmental/conservation act injunctions it had earlier announced. That "analysis," however, is based on a spurious reading of ANILCA that ignores legislative history and intrudes into the sphere of policy formulation reserved by the Constitution for Congress.

The Ninth Circuit attempted to bolster its newly announced per se rule by appealing to this Court's analysis in *TVA v. Hill, supra. See Gambell II,* 774 F.2d at 1426 n.2. Quoting this Court's words in *Weinberger v. Romero-Barcelo, supra,* in summary of its position in *Tennessee Valley Authority v. Hill* that "Congress, it appeared to us, had chosen the snail darter over the dam," *Gambell II,* 774 F.2d at 1426 n.2, *citing Romero-Barcelo,* 456 U.S. at 314, the Ninth Circuit then brought forward the startling analogy that "[i]t appears to us that in enacting section 810, *Congress has chosen the protection of subsistence life over oil exploration.* Thus, only the issuance of a preliminary injunction to compel compliance with the requirements of Section 810 can uphold Congressional intent." *Id.*

(emphasis added). The Ninth Circuit amplified its conclusion later on:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that *the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must prevail over our possible energy needs.* Thus, the denial of a preliminary injunction was error because the court misapplied the law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *Gambell II*, 774 F.2d at 1428 (emphasis added).

No such public interest has been expressed by Congress, nor has Congress announced such a policy. Both the expression and announcement represent the bald policy assertions of the Ninth Circuit in direct contradiction of congressional intent.

The Ninth Circuit's position amounts to a *substantive* preference for subsistence uses under Section 810(a) of ANILCA. But by the Ninth Circuit's own estimation, Section 810(a) creates *procedural* duties and rights only. *Gambell II*, 774 F.2d at 1422. This distinction is borne out by the legislative history. Senate Report No. 413, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. No. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

In *Gambell II* the court nowhere acknowledged this language nor incorporated it into its analysis of congressional policy underlying ANILCA.[7]

The federal courts are without authority to engage in this sort of substitutionary policy formulation. This Court has unmistakably indicated that it will not overturn the policy choices Congress has made:

> "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent." *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 215 (1962), *overruled on other grounds,* 398 U.S. 235 (1970).

Likewise, in this instance it is crystal clear that Congress has established *procedural* requirements under ANILCA that express no *substantive* preference for subsistence uses over necessary energy development.

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[7] This is especially surprising since the court quoted this very language in its earlier decision in *Gambell I* for this very principle, viz., the procedural nature of the Section 810(a) requirements with the real possibility of adverse impacts on subsistence uses upon completion of the required process. *See People of the Village of Gambell v. Clark,* 746 F.2d 572, 582 (9th Cir. 1984).

The rationale for such restraint is ably set out by the court in *McCoy v. Thorn*, 451 F. Supp. 351 (W.D. La. 1978):

> "It is for legislators, not judges, to decide important matters of public policy. It is for judges, independently and without fear of political reprisal, to interpret the law after the people, through the Constitution or through their elected representatives, have decided what public policy should be.
>
> "Once the judiciary embarks on a course of policy determination beyond the mere interpretation of law, it erodes the democratic process. Independent policy determination by a court violates the principle, embodied in the Constitution and proclaimed in the Declaration of Independence, that a political sovereign derives its power solely from the people." *Id.* at 352.

In attempting to justify its rule of per se injunctive relief upon a showing of violation of an environmental or conservation statute, the Ninth Circuit in *Gambell II* crossed the line into impermissible policy formulation in defiance of congressional intent. The Court should firmly direct it away from this error.

CONCLUSION

The Ninth Circuit used the occasion of its decision in *Gambell II* to announce a per se rule granting injunctive relief upon a showing of probable violation of an environmental or conservation statute. Such a per se rule is in violation of this Court's express directions given in *Weinberger v. Romero-Barcelo, supra*, and should be over turned. The Ninth Circuit has erroneously interpreted ANILCA to create an implied repeal of OCSLAA, and has

usurped the policy formulating role of Congress. Amici respectfully request this Court to correct these errors.

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